

SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 98-327

IN THE MATTER OF :
:
MANUEL R. DIAZ :
:
AN ATTORNEY AT LAW :
:

Decision
Default [R. 1:20-4(f)]

Decided: April 5, 1999

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter is before the Board based on a certification of default filed by the Office of Attorney Ethics ("OAE"), pursuant to R. 1:20-4(f).

On or about April 23, 1998 the OAE sent a copy of the complaint by regular and certified mail to respondent's last-known address: 425 Seventh Street, Union City, NJ 07087. Although the certified mail was returned checked "unclaimed," the regular mail was not returned. At some unspecified time, respondent requested to be "re-served" with the complaint. A second complaint was sent to him by regular and certified mail on May 19,

1998. Again, the certified mail came back marked "unclaimed." The record is silent as to whether the regular mail was returned.

On June 19, 1998 the OAE sent respondent a second letter by certified and regular mail, informing him that, if he did not reply within five days, the matter would be certified to the Board for the imposition of sanctions. The record does not indicate whether mail was returned. Sometime after June 19, 1998 and before June 29, 1998, respondent advised the OAE that he had not received any of the above mailings. Respondent then personally picked up a copy of the complaint at the OAE offices on June 29, 1998. On that same day, the OAE sent respondent a letter by regular and certified mail, informing him that the matter would be certified to the Board for the imposition of sanctions if he did not file an answer. When respondent failed to file an answer, the matter was certified to the Board.

Notice of the Board's review of this default was published in both the New Jersey Law Journal and the New Jersey Lawyer on October 5, 1998.

Respondent was admitted to the New Jersey bar in 1980. At the relevant times, he maintained an office at 512 42nd Street, Union City, NJ 07087. In 1996 respondent was temporarily suspended from the practice of law, pending the disposition of the within matters. In re Diaz, 146 N.J. 484 (1996). Subsequently, in a separate matter, respondent was suspended for three months for entering into a business transaction with a client without a written agreement and without obtaining a waiver [RPC 1.8(a)(1) and (3)], for negligently misappropriating client funds [RPC 1.15(a)] and for failing to properly maintain books and

records [RPC 1.15(d) and R. 1:21-6]. In re Diaz, 151 N.J. 318 (1997).

The complaint alleges that, on July 9, 1996, Mary Ellen Edwards, Esq., mailed a letter to the OAE alleging that a check that respondent had issued to her client, Northern Financial Equity Group (“Northern”), had been returned for insufficient funds. On July 12, 1996 the OAE sent a copy of that letter to respondent and requested a response.

When respondent failed to reply, the OAE sent a second letter, dated July 25, 1996, advising him that a demand audit would be conducted on August 13, 1996 at the OAE’s office. At approximately 9:45 A.M. on August 13, respondent’s office manager, Lourdes Davila, telephoned the OAE with the news that respondent had been involved in a traffic accident. Davila told the OAE that respondent would try to appear by 1:00 P.M. Davila called again at 2:45 P.M., advising the OAE that respondent had a family emergency that prevented him from attending the audit on that day. Respondent called later that day and rescheduled the audit for the following day at 1:00 P.M.

The next day, five minutes after the audit was to begin, respondent had Davila telephone the OAE to state that he was “en route” to the OAE’s office. Davila called the OAE again at 2:15 P.M. and stated that respondent had been admitted to the hospital with chest pains. The hospital admission was verified by the OAE.

The OAE then granted respondent’s request and adjourned the audit until August 22, 1996 at 9:30 A.M., at which time respondent called the OAE and claimed that he would not attend the audit because his mother had undergone surgery the previous day. The OAE

agreed to adjourn the audit and directed respondent to “fax” a written explanation for the return of the check to Northern for insufficient funds. Respondent “faxed” an explanation that the OAE deemed unsatisfactory.

The audit was again rescheduled, this time for August 29, 1996 at 9:30 A.M., to take place in respondent’s office. When the auditors arrived, Davila explained that respondent had been delayed at the hospital where he was visiting his mother. Respondent finally arrived at about 11:15 A.M., but claimed to have left the requested documents at the hospital. The OAE asked respondent to go back to the hospital, get the records and return to his office with the records by 1:30 P.M. At 2:15, when respondent had not returned or called, the auditors left respondent’s office. The following day, the OAE “faxed” respondent a letter directing him to appear with the requested records for an audit on September 4, 1996 at 10:00 A.M.

At 4:00 P.M. on September 4, respondent finally appeared for the audit, again without the requested records. Respondent assured the OAE that he would have the records hand-delivered the following day. When respondent did not send the records, the OAE filed a motion for his temporary suspension for his failure to cooperate with the investigation. Following an order to show cause on October 8, 1996, the Supreme Court directed that the OAE afford respondent another opportunity to provide the requested documents.

Respondent met with the OAE on October 11, 1996 at 10:00 A.M. at his office. Respondent furnished only some of the requested documents and admitted that he had

knowingly misappropriated client trust funds. The Supreme Court temporarily suspended respondent on October 16, 1996. In re Diaz, 146 N.J. 484 (1996). From records and statements provided by respondent, the OAE determined that respondent had knowingly misappropriated funds in four matters, as follows:

I. The Vega-Villasante Matter

Respondent represented Manuel Vega and Armando Villasante, who held a mortgage of \$95,450 on a property in West New York, owned by Raef Eid and Richard Acoury. When Eid and Acoury arranged for a sale of the property to William and Mirminet Bilali, Vega and Villasante agreed to accept a payment of \$40,000 to discharge the mortgage.

On February 21, 1996 Maria Gesualdi, the attorney for Eid and Acoury, forwarded to respondent two checks totaling \$45,000. Respondent was to hold the funds in escrow, pending transfer of title to the Bilalis. After the transfer, respondent was to forward \$40,000 to Vega and Villasante and \$5,000 to Eid and Acoury.

On February 29, 1996 respondent opened a new attorney trust account, which did not have an "accutrak" feature.¹ On that same day, he made a deposit into this account totaling \$184,090.25, which consisted of the \$45,000 escrow check and a check for \$139,090.25 made payable to respondent's wife. On March 1, 1996, from this new trust account,

¹ The accutrak feature allows an attorney to direct funds to and remove funds from "sub-accounts." Each "sub-account" is for one client, thereby assisting the attorney in keeping a separate record of individual client funds.

respondent wrote check number 17609 in the amount of \$184,090.25, payable to Banco Popular de Puerto Rico. These funds were used to pay off a mortgage for an individual identified as Varela, from whom respondent's father-in-law had borrowed money to prevent a foreclosure on the father-in-law's house. Respondent admitted to the OAE that he knowingly misappropriated the \$45,000 and used the money for that mortgage pay-off.

The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(b), as well as conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c).

II. The Escobar Matter

Respondent represented Mr. and Mrs. Hortensio Lopez, whose mortgage payments had been in arrears, causing the mortgagee, Northern, to foreclose on their house. The Lopezes then entered into an agreement with Northern to repurchase their house by paying \$80,000 for the mortgage and an additional \$12,000 for legal fees incurred by Northern.

As of June 12, 1996, the Lopezes owed a balance of \$39,880 to Northern. On that date, respondent disbursed trust account check number 1019 to Northern, in the amount of \$39,880. On June 14 that check was returned for insufficient funds.

As mentioned previously, Northern's attorney notified the OAE of the returned check, and the OAE requested an explanation from respondent. On August 22, 1996 respondent "faxed" an explanation to the OAE. He claimed that the Lopezes had given him a check for

\$39,800, which he had deposited into his account on June 5, 1996. He further claimed that, without his knowledge, the Lopezes had stopped payment on that check. Respondent submitted a deposit slip and a June 1996 bank statement in support of his claim. In fact, respondent had falsified those two documents. The OAE later subpoenaed the June 1996 statement from the bank, which showed no deposit for \$39,880 and revealed the \$14,795 wire transfer to Northern. At that time, respondent's trust account should have held \$16,842.66 for his client, Gregorio Escobar. However, following the \$14,795 wire transfer, only \$100.06 remained in his attorney trust account. Respondent eventually acknowledged to the OAE that he should have been holding the funds in trust for Escobar.

The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(b), as well as conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c).

III. The Ortiz Matter

Count three of the complaint concerned respondent's representation of Robert Ortiz in the purchase of property from Guy Stadtmuller, as well as his actions as the settlement agent for the July 6, 1995 closing. It was respondent's responsibility to pay off Stadtmuller's two mortgages, totaling \$270,000. On the date of the closing, respondent received \$302,132.98 in connection with the transaction, consisting of a wire transfer for \$275,022.25

into the Ortiz "sub-account" and a treasurer's check for \$27,110.73, dated July 7, 1995.²

From the Ortiz "sub-account" respondent wrote check numbers 1440, 1441 and 1442, totaling \$24,900. These checks were unrelated to the Ortiz closing. This reduced the balance of the account to \$250,122.25. On July 7, 1995 respondent disbursed check number 2075, from the Ortiz sub-account, in the amount of \$111,000. That check was used for Orlando Bru, another client. This left the Ortiz sub-account with a balance of \$139,122.25, or a shortage of \$135,900. The record seems to indicate that respondent eventually paid of the Stadtmuller mortgages.

The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(b), as well as conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c).

IV. The Cuevas Matter

Vincent Cuevas retained respondent to obtain an insurance settlement from his insurer, Franklin Insurance Company ("Franklin"), and to negotiate the pay-off of a mortgage held by Citicorp Mortgage, Inc. ("Citicorp"). Respondent retained the services of Richard Perez, a public adjuster, to assist in the recovery of the insurance proceeds.

Franklin sent a settlement check to Perez for \$74,307, which Perez forwarded to

² This check was not deposited into respondent's attorney trust account until July 21, 1995. Therefore, the misappropriations described herein, as well as the amounts left in the account, all refer to the \$275,022.25 wire transfer.

respondent. Cuevas went to respondent's office on or about August 10, 1996 and endorsed the check. While in respondent's office, Cuevas instructed respondent to offer the funds to settle a foreclosure action instituted by Citicorp. Although respondent did deposit the check into his attorney trust account on August 18, 1995, he directed it to the Ortiz "sub-account." This increased the balance of the Ortiz "sub-account" to \$199,075.11.³

Between August 18 and August 21, 1995 respondent made the following disbursements from the Ortiz "sub-account," none of which were related to Cuevas: (1) check number 1921 for \$2,000 to Manuel Sanchez; (2) check number 2004 for \$9,500 to Eva Diaz; (3) check number 2050 for \$10,000 on behalf of respondent's father-in-law; and (4) check number 1922 for \$180,000 as partial payment of the \$270,000 owed from the Ortiz matter.

The complaint charged respondent with knowing misappropriation of client funds, in violation of RPC 1.15(b), as well as conduct involving dishonesty, fraud, deceit and misrepresentation, in violation of RPC 8.4(c).

* * *

Service of process was properly made. Any doubts that might have been raised about

³ Although the record does not indicate whether additional Ortiz funds had been misappropriated since the July 11, 1995 disbursement of \$111,000, it is apparent that additional funds had been disbursed. Otherwise, the account balance would have been \$213,429.25.

the service of the complaint were dispelled when respondent personally picked up a copy of the complaint from the OAE's office. Respondent did not file an answer. Pursuant to R. 1:20-4(f)(1), the Board deemed the allegations of the complaint admitted.

Respondent knowingly misappropriated client funds in four matters. It is obvious from the OAE's reconstruction of respondent's records that respondent knowingly misused client's funds to satisfy family obligations, such as his father-in-law's mortgage, and obligations of other clients. The Board, thus, found violations of RPC 1.15(b) and RPC 8.4(c) in all four matters.

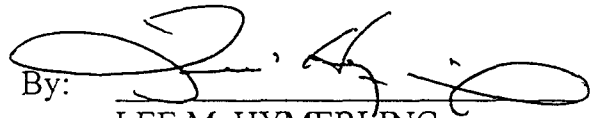
Although not specifically charged in the complaint, a violation of RPC 8.1(a) (knowingly making a false statement in a disciplinary matter) and RPC 8.1(b) (failure to cooperate with the disciplinary authorities) could also be found. Respondent knowingly submitted forged bank documents to the OAE during the investigation into the Escobar matter. In addition, he was otherwise uncooperative with the audit and failed to file an answer to the complaint, thereby causing this matter to proceed as a default. When, as here, a complaint fails to charge specific ethics violations, but the facts in the record are sufficient to put respondent on notice of those violations, the complaint may be deemed amended to conform to the proofs. In re Logan, 70 N.J. 223, 232 (1976). The Board, therefore, deemed the complaint amended to charge RPC 8.1(a) and 8.1(b) violations, and found clear and convincing evidence that respondent violated those RPCs.

Under In re Wilson, 81 N.J. 451 (1979) (knowing misappropriation of client funds

mandates disbarment), respondent must be disbarred. See also In re Blumenstyk, 152 N.J. 158 (1997) (disbarment for knowing misappropriation where violation was not discovered until OAE audit after to full restitution of funds to attorney trust account); In re Freimark, 152 N.J. 45 (1997) (disbarment for knowing misappropriation in multiple client matters, even though attorney replenished trust account); In re Whitefield, 149 N.J. 309 (1997) (disbarment for knowing misappropriation in four client matters). The Board unanimously recommends respondent's disbarment.

The Board further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 4/5/99

By: 
LEE M. HYMERLING
Chair
Disciplinary Review Board

SUPREME COURT OF NEW JERSEY

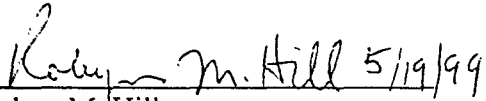
*DISCIPLINARY REVIEW BOARD
VOTING RECORD*

**In the Matter of Manuel R. Diaz
Docket No. DRB 98-327**

Decided: April 5, 1999

Disposition: Disbar

Members	Disbar	Suspension	Reprimand	Admonition	Dismiss	Disqualified	Did not Participate
Hymerling	x						
Zazzali	x						
Brody	x						
Cole	x						
Lolla	x						
Maudsley	x						
Peterson	x						
Schwartz	x						
Thompson	x						
Total:	9						


Robyn M. Hill
Chief Counsel